

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

RICHARD E. SUYDAM,)	
)	
Plaintiff)	
)	
v.)	Civil No. 98-0211-B
)	
WASHINGTON COUNTY, et al.,)	
)	
Defendants)	

MEMORANDUM OF DECISION¹

This is an action alleging racial discrimination in employment related to Defendants’ failure to hire Plaintiff to a position with the Washington County, Maine, Sheriff’s Office. The Complaint purports to state two causes of action. The first cause of action is stated to arise under the Fourteenth Amendment, 18 U.S.C. section 242, 28 U.S.C. section 241, 42 U.S.C. sections 1981, 1983, 1985, 1988, 2000d, 2000e-2, “provisions of Title VI of the Civil Rights Act of 1964, and Article I, Sections 4 and 6-1 of The Maine State Constitution.” Complaint at 5. The second cause of action is captioned: “42 U.S.C. § 1981, 42 U.S.C. § 1983.” Defendants read the Complaint as alleging federal claims under Title VII of the Civil Rights Act of

¹ Pursuant to Federal Rule of Civil Procedure 73(b), the parties have consented to allow the United States Magistrate Judge to conduct any and all proceedings in this matter.

1964 (42 U.S.C. § 2000e-2), and 42 U.S.C. sections 1981 and 1983.² They now move to dismiss the Title VII claims as untimely filed, and they seek judgment as a matter of law on the section 1981 and 1983 claims. Further, they seek judgment on Plaintiff's state claims, which arise not directly from the Maine Constitution, but from the Maine Civil Rights Act, 5 M.R.S.A. sec. 4681-85, for the same reasons invoked in support of their request for judgment on the federal claims. Plaintiff has not responded to the Motion to Dismiss or for Summary Judgment, and the time in which he was permitted to do so has expired.

Discussion

1. Amendment of the Answer.

As a preliminary matter, Defendants did not allege failure to comply with the statute of limitations of Title VII in their Answer. They now seek leave to amend the Answer to include this affirmative defense. Plaintiff's failure to respond to the

² Defendants are essentially correct in this assessment. Presumably, Plaintiff sought to invoke the provisions of 18 U.S.C. section 242, rather than 28 U.S.C. section 242. Title 18 contains criminal law provisions, not available to private plaintiffs. 42 U.S.C. section 1988 does not provide an independent cause of action, nor does section 2000d, which in any event prohibits discrimination in the availability of federally funded programs. Plaintiff's claim under 42 U.S.C. section 1985, however, is a separate claim for conspiracy to deprive him of his civil rights. Defendants do not challenge Plaintiff's evidence of a conspiracy in this Motion for Summary Judgment. A successful challenge to the threshold question whether Plaintiff has evidence sufficient to prevail on his claim under section 1983 would dispose of this claim as well. *See, Rumford Pharmacy v. City of East Providence*, 970 F.2d 996, 1000 n.7 (1st Cir. 1992) (citing *Rodriguez-Garcia v. Davila*, 904 F.2d 90, 99 (1st Cir. 1990)).

Motion is construed in this District as a waiver of objection to the Motion. D. Me. R. 7(b). Accordingly, the Motion to Amend Answer is hereby GRANTED.

2. *Dismissal of Title VII claims.*

Defendants seek dismissal of Plaintiff's claims under Title VII on the ground that Plaintiff failed to file suit within 90 days after the dismissal of his complaint by the Equal Opportunities Commission, as required under 42 U.S.C. section 2000e-5(f)(1). The record reveals that the "Dismissal and Notice of Rights" was mailed to Plaintiff on July 8, 1997. Crowley Aff., Ex. 5. This action was filed on October 20, 1998, well over the ninety-day limit. Plaintiff has waived objection to dismissal on this ground by his failure to respond to the Motion to Dismiss. Accordingly, the Motion to Dismiss Plaintiff's claims under Title VII of the Civil Rights Act of 1964 is hereby GRANTED.

3. *Summary Judgment on the federal claims.*

Defendants seek judgment as a matter of law on Plaintiff's claims arising under 42 U.S.C. sections 1981 and 1983. The Federal Rules of Civil Procedure require us to examine the merits of a motion for summary judgment regardless of the opposing party's failure to object. *FDIC v. Bandon Assoc.*, 780 F. Supp. 60, 62 (D. Me. 1991). Summary judgment is appropriate "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on

which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). Once the moving party has presented evidence of the absence of a genuine issue, the nonmoving party must respond by "placing at least one material fact in dispute." *Anchor Properties*, 13 F.3d at 30 (citing *Darr v. Muratore*, 8 F.3d 854, 859 (1st Cir. 1993)).

The elements of Plaintiff's claims under section 1981 and 1983 are the same. Both claims are analyzed under the burden-shifting analysis first articulated in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). *St. Mary's Honor Center v. Hicks*, 509 U.S. 502 (1993) (applying *McDonnell Douglas* analysis to section 1983 claim); *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989) (applying the analysis to section 1981 claim).

Under the *McDonnell Douglas* framework, Plaintiff is initially required to show that he applied for and was qualified for a position with Defendants, that he was rejected for the position, and that Defendants thereafter continued to seek applicants for the position, or filled the position with a white person. *Patterson*, 491 U.S. at 186. Defendants' Statement of Material Facts presents the following facts relevant to Plaintiff's prima facie case.

In early December, 1996, Plaintiff had an informal conversation with Defendant Crowley, during which he expressed renewed interest in employment with

the Washington County Sheriff's Office. Plaintiff had formally applied for such a position in 1991. Defendant Crowley told Plaintiff to submit certain written materials, including a written explanation of comments Plaintiff had allegedly made to unidentified persons regarding women and obtaining firearms. Plaintiff agreed to do so.

Sometime thereafter Defendant Crowley received a certified letter from Plaintiff, which he declined to accept pursuant to department policy. Defendant Crowley told Plaintiff to either bring the materials in personally or send them by regular mail. Plaintiff never provided the materials.

Defendants have thus presented evidence showing that Plaintiff never actually "applied" for a position with the Sheriff's Office. Further, there is no evidence in the record that there was a position available at the time Plaintiff expressed interest in 1996, or that Defendant thereafter continued to seek candidates, or filled a position with a white applicant. Plaintiff, having failed to respond to the Motion at all, has failed to place these material facts into dispute. On this record, summary judgment is appropriately entered on Plaintiff's claims under 42 U.S.C. sections 1981, 1983, and 1985.

4. *The state law claim.*

Because judgment is hereby entered on those claims over which this Court had original jurisdiction, Plaintiff's state law claims are properly dismissed without prejudice to Plaintiff's right to present the issue to the state court. *Eg., Temple v. City of Belfast*, 30 F. Supp. 60, 68 (D. Me. 1998).

Conclusion

For the foregoing reasons, Defendants' Motion to Amend Answer is GRANTED, Defendants' Motion to Dismiss Plaintiff's claim under Title VII is GRANTED, Defendants' Motion for Summary Judgment on Plaintiff's remaining federal claims is GRANTED, and Plaintiff's state law claims are hereby DISMISSED for lack of subject matter jurisdiction.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) (1988) for which *de novo* review by the district court is sought, together with a supporting memorandum, within ten (10) days of being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to *de novo* review by the district court and to appeal the district court's order.

Eugene W. Beaulieu
United States Magistrate Judge

Dated on May 10, 1999.